United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7026 B

United States Court of Appeals

For the Second Circuit.

P/S

WILLIAM STEINMAN,

Appellant,

-against-

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Appellee.

On Appeal From The United States District Court For The Eastern District Of New York

Appellant's Brief

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supervision, direction and control, and acting in

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1. Did the extreme prosecutorial misconduct conclusively documented at bar, warrant federal intervention of the pending state prosecution, by declaratory and injunctive relief, under the 5th and 14th Amendments of the Constitution and under the redress provision of 28 USC 1343?

2. Did appellant suffer great, immediate and irreparable injury in his fundamental rights to a fair trial?

3. Did appellee's prosecutorial misconduct shocking to the conscience, and to basic tenets of decency, result in great, immediate and irreparable injury to the integrity of the judicial process and to the rule of law?

4. Was appellant deprived of an adequate remedy at law and of all meaningful access to the state courts?

5. Did the District Court err in denying declaratory and injunctive relief under the extraordinary circumstances at bar?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

NEW YORK STATE CONSTITUTION

Article 6, Sec. 27:

> Section 27 (Extraordinary Term of the Supreme Court):
>
> The Governor may, when in his opinion the public interest requires, appoint Extraordinary Terms of the Supreme Court. He shall designate the time and place of holding the term and the Justice who shall hold the term. The Governor may terminate the assignment of the Justice and may name another Justice in his place to hold the term.

STATUTES OF STATE OF NEW YORK

Judiciary Law, Sec. 149:

> Section 149. Governor may appoint extraordinary terms and name justices to hold them
>
> 1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term.

Executive Law, Sec. 63:

> Section 63. General Duties. The Attorney General shall:
>
> 1. Prosecute and defend all actions and pro-

on December 19, 1973, that SILLMAN had [illegible]

ceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state***.

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement***.

Governor's Executive Order Dated September 19, 1972
(9NYC RR 1.58)

"I. Pursuant to article IV section three of the Constitution of the State of New York, the provisions of subdivision two of section 63 of the Executive Law and the statutes and law in such case made and provided, and in view of the recommendation of the Commission to Investigate Allegations of Police Corruption in the City of New York, I hereby require that you, the Attorney General of this State, attend in person, or by one or more of your assistants or deputies, an Extraordinary Special and Trial Term of the Supreme Court to be appointed by me to be held in and for the county of Kings, at the County Court House and any other term or terms of the supreme Court in and for the County of Kings, and that you, in person or by said assistants or deputies, appear before the grand jury drawn for said extraordinary term of said court, and before any grand jury or grand juries which shall be drawn or which shall have heretofore been drawn for any other term or terms of said court, for the purpose of managing and conducting in said court and before said grand jury and said other grand juries any and all proceedings, examinations and inquiries and any and all criminal actions and proceedings which may be had or taken by or before said grand jury and grand juries concerning or relating to:

(a) any and all corrupt acts and omissions by a public servant or former public servant occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(b) any and all acts and omissions and alleged acts and omissions by any person occurring heretofore or hereafter in the County of Kings in violation of any provision of State or local law and arising out of, relating to or in any way connected with corrupt acts or omissions by a public servant or former public servants arising out of, relating to or in any way connected with the enforcement of law or administration of criminal justice in the City of New York;

(c) any and all acts and omissions and alleged acts and omissions occurring heretofore or hereafter to obstruct, hinder or interfere with any inquiry, prosecution, trial or judgment pursuant to or connected with this requirement; and that you conduct, manage, prosecute and handle such other proper actions and proceedings relating thereto as may come before said court and that you conduct, manage, prosecute and handle all trials at said extraordinary term of court or at any term of said court at which any and all indictments which may be found and which may hereafter be tried, pursuant to or in connection with this requirement, and in the event of any appeal or appeals or other proceedings connected therewith, to manage, prosecute, conduct and handle the same; and that in person or by your assistants or deputies you, as of the date hereof, supersede and in the place and stead of the District Attorney for the County of Kings exercise all the powers and perform all the duties conferred upon you by the statutes and law in such case made and provided and this requirement made hereunder; and that in such proceedings and actions the District Attorney of the County of Kings shall exercise only such powers and perform such duties as are required of him by you or your assistants or deputies so attending."

STATUTES OF UNITED STATES

Title 28 USC 1343

"Sec. 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To receover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Instead during all that time, he was held incommunicado,

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"[illegible] Supreme Court Judge through the informant DiStephano.(16)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

WILLIAM STEINMAN,

Appellant,

-against-

DOCKET NO. 75-7026

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Appellee.

----------X

BRIEF FOR APPELLANT

Statement

This is an appeal from an order made by Hon. Mark A. Costantino, United States District Judge for the Eastern District of New York, dated August 8, 1974, denying an application for a three-judge Court (28 USC 2284), (6)*, and from a judgment rendered on the 13th day of December, 1974, by the District Judge aforesaid, dismissing the appellant's action for a Declaratory Judgment and for injunctive relief. (106).

The action for a Declaratory Judgment brought pursuant to 28 USC 2201, was predicated on two separate grounds:

*Numerals refer to page numbers of the Appendix

1. To declare the pending state prosecution instituted by the appellee, MAURICE H. NADJARI against appellant, null and void under the Fifth and Fourteenth Amendments of the Constitution of the United States, for conduct so shocking to the conscience and offensive to the canons of decency and fundamental fairness as to warrant federal intervention under the Due Process Clause. (2).

2. Pursuant to Title 28 USC 1343, to redress the deprivation, under color of state law, of the rights, privileges and immunities secured and protected by the Constitution of the United States, by declaring the indictment, together with all proceedings thereunder null and void under the Due Process Clause of the Constitution. (2).

STATEMENT OF THE CASE

The Complaint for Declaratory Judgment in the District Court below

Appellant's complaint in the action for Declaratory Judgment and for injunctive relief alleged substantially as follows:

Appellee, MAURICE H. NADJARI, Special Deputy Attorney General of the State of New York (hereinafter referred to as NADJARI), was designated and appointed as such pursuant to Executive Order No. 58 issued September 19, 1972 by the

Governor of the State of New York under the purported authorization of Article 6, Section 27 of the Constitution of the State of New York, Section 63 of the Executive Law and Section 149 of the Judiciary Law of the State of New York. (2).

Appellant, WILLIAM STEINMAN, (hereinafter referred to as STEINMAN), is the named defendant in a criminal proceeding instituted by NADJARI, under an indictment filed in the Supreme Court of the State of New York, Extraordinary Special and Trial Term, County of Kings, on December 19, 1973, charging appellant with the crimes of Conspiracy in the Third Degree, Attempted Bribery in the Second Degree, and Grand Larceny in the Second Degree, in violation of the penal statutes of the State of New York. (3).

Under color of the penal statutes of the State of New York and Executive Order No. 58 as aforesaid, and as applied and enforced by the defendant NADJARI, his agents and deputies, in the manner herein specifically set forth, the plaintiff-appellant STEINMAN herein was deprived of his rights, privileges and immunities secured and protected by the Constitution of the United States, and of his right to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States, as follows:

(a) The defendant NADJARI, his agents and deputies

acting under his supervision, direction and control, and acting in concert with the Federal Strike Force of the United States Attorney for the Southern District of New York, unlawfully and wrongfully ensnared and entrapped STEINMAN, into the commission of the alleged crimes charged against him, resulting in his arrest, indictment and pending prosecution therefor aforestated. (3).

(b) The defendant NADJARI, grossly abused his oath and authority in that he wilfully and wrongfully failed and refused to arraign STEINMAN in a criminal court following his arrest on September 25, 1973 as required by law as aforestated; and did wrongfully and wilfully deny to him the due protection of the Court, his right to counsel, his right to a preliminary examination, and his constitutional right to confrontation of the witnesses against him, at a critical stage of the proceedings against him. (4).

(c) The defendant NADJARI, his agents and deputies, acting in concert with various agents of the United States Attorney for the Southern District of New York and the Police Department of the City of New York, unlawfully held STEINMAN incommunicado from the date of his arrest, September 25, 1973 as aforestated, until approximately three months afterwards, for the specific purpose and design to attempt to coerce and intimidate him to entrap and ensnare various public servants within the criminal justice system of Kings County, State of New York, including particularly any Justice of the Supreme Court of the State of New York, County of

Kings, members of the District Attorney's Office of Kings County, and the United States Attorney's Office for the Eastern District of New York, into the commission of bribery, perjury and other related crimes; and the said defendant NADJARI, his agents and deputies, acting in concert with other law enforcement officers as aforestated, did continuously threaten STEINMAN that if he did not "cooperate" as aforestated, he would be "immediately" fingerprinted, booked and arraigned in a criminal court in connection with his arrest as aforestated, and further would suffer the loss of his pension as Administrative Assistant of the Comptroller's Office of the State of New York. (4-5).

(d) The defendant NADJARI, his agents and deputies, acting in concert with law enforcement officers as aforestated, and in wilful defiance of the Court's plain admonition in United States v. Archer, 486 F 2d 670, against the continued practice by him of "Government-induced criminality", did nevertheless, wilfully continue to employ such practices against STEINMAN, up to and including the date of his indictment, December 18, 1973. (5).

(e) The defendant NADJARI, did attempt to coerce STEINMAN, to plant an electronic eavesdropping device or "bug" in the headquarters of the Democratic County Committee of Kings County, without authorization of law; and did further attempt to coerce him through an informant Nicholas DiStephano, to ensnare and entrap certain named members of the Judiciary within the criminal justice system of Kings County, and a named Judge of the

Surrogates Court, into the commission of criminal acts, and to entrap and ensnare a named Congressman into the commission of an act of bribery for the introduction of an Alien Bill into Congress; and did further attempt to force the plaintiff to entrap and ensnare a specifically designated Assistant District Attorney of Kings County to buy and pay for a Criminal Court Judgeship through a named political leader of Kings County. (5).

(f) In pursuance of the defendant's plan and scheme to entrap innocent persons within the criminal justice system of Kings County into the commission of crimes as aforestated, NADJARI, his agents, deputies and others acting in concert with him, without any sanction or authority in law whatsoever, contrived and systematically employed the device of a mock arrest and conviction of a Federal undercover agent to accomplish such purposes, and that in pursuance thereof the said NADJARI did suborn perjury of various witnesses in testifying perjuriously in the Criminal Courts of the State of New York, and before the Grand Jury, and did further deceive the Supreme Court of the State of New York, County of Kings, with respect to the plea and sentencing proceedings in regard to the staged arrest and conviction of the Federal undercover agent aforesaid. (5-6).

(g) The defendant NADJARI, his agents and deputies, in concert with other law enforcement agents aforestated,

between STEINMAN and any member of the Office of the Special

did falsely and frauduently represent to the United States Court of Appeals in a criminal proceeding entitled United States v. Archer, supra, decided July 12, 1973, rehearing denied September 26, 1973, and again to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, in a criminal proceeding involving the requested dismissal of the indictment against this plaintiff on constitutional and statutory grounds, that the said manufactured device of a mock and staged arrest and conviction of a Federal undercover agent had been expressly authorized, sanctioned and approved by the Chief Judge of the Court of Appeals of the State of New York, whereas in truth and in fact the said Chief Judge had never sanctioned or approved such practice, and had in fact explicitly declined to disapprove the same; and had in fact further so specifically informed the defendant, NADJARI, through his agents and deputies, long prior to the date of the entrapment and arrest of this appellant as aforestated. (6).

The defendant NADJARI, did wrongfully and wilfully contrive to deprive STEINMAN of his right to a fair and impartial trial, particularly as to his right to assert the affirmative defense of entrapment, by prejudically asserting and disseminating in a widely-reported news conference attended by the United States Attorney for the Southern District of New York,

on December 19, 1973, that STEINMAN had a criminal pre-disposition, whereas in truth and in fact, he had no criminal pre-disposition of any kind and had never been involved in any act relating to bribery, larceny whatsoever. (6-7).

Again, the defendant NADJARI, his agents and deputies, did, on successive dates thereafter, April 1st and April 2nd, 1974, seriously prejudice appellant's rights to a fair and impartial trial by further publicity through the media regarding his alleged criminal pre-disposition, directly violative of the Canons of Professional Responsibility promulgated by the American Bar Association in August 1969 dealing with "trial publicity", and directly violative of the order of the Appellate Division of the Second Judicial Department dated January 25, 1974, directing the sealing of all records pertaining to the criminal case pending against him; and violative of the plaintiff's rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution. (6-7).

By reason of the facts aforestated, the defendant NADJARI, individually and as Deputy Attorney General of the State of New York, has so grossly abused his authority and jurisdiction under the color of the Governor's Executive Order No. 58 aforestated, that he, his agents and deputies,

and all others acting in concert with him, have thrust themselves into direct violation of the penal statutes, both state and federal, as follows: Criminal Soliciation (Penal Law, Section 100.00); Coercion in the First Degree (Penal Law, Section 135.60); Conspiracy to Commit Bribery in the Third Degree (Penal Law, Section 105.05); Attempted Eavesdropping, (Penal Law, Section 250.05); Official Misconduct (Penal Law, Section 195.00); Conspiracy to Commit Perjury in the First Degree (Penal Law, Section 210.15); Conspiracy to Commit Perjury in the Second Degree (Penal Law, Section 210.10); Criminal Impersonation (Penal Law, Section 190.25); Deprivation of rights under color of law (Title 18 United States Code Section 242); Conspiracy against rights of citizens (Title 18 United States Code Section 241); among others. (7-8).

The prosecutorial misconduct of the defendant, NADJARI, his agents and deputies and the law enforcement agents acting in concert with him, as aforestated, under color of the penal statutes of the State of New York and Executive Order No. 58, is so shocking to the conscience, and offensive to the canons of decency, and so violative of principles of fundamental fairness and a universal sense of justice, that the Court should bar the said defendant, NADJARI, from invoking judicial processes to prosecute the indictment obtained

the petitioners' contention that the

against this plaintiff, and to dismiss the indictment in the interests of justice, in order to protect the integrity of the administration of criminal justice, to preserve the purity of the Courts, and to protect the citizen, and particularly this plaintiff, from the lawless and unconscionable conduct of law enforcement officers. (8).

The plaintiff, STEINMAN, has no adequate remedy to redress the deprivation of his constitutional rights, or to prevent the irreparable injury to him, except by way of an injunction, pursuant to Title 28 United States Code, Sections 2281 and 2284, to stay the prosecution, and for a declaratory judgment to declare the indictment against him null and void under the Fifth and Fourteenth Amendments of the Constitution. (8-9).

The Application for a Three-Judge Court.

In support of the application for a three-judge Court, pursuant to 28 USC 2281, appellant further alleged as follows:

On September 25, 1973, he was arrested by police officers in front of the Supreme Court Building, in the Civic Center, Brooklyn, New York. From the day of his arrest until the day of his indictment on December 18, 1973, he was never booked, fingerprinted or arraigned in any Court in

By order entered August 8, 1974, your deponent

connection therewith. (13).

Instead, during all that time, he was held incommunicado, deprived of his rights to a preliminary hearing, confrontation of the witnesses against him, right to counsel and to the protection of a Court or Judge, during the critical stages of the proceeding against him. (13).

He was continuously warned and threatened that unless he "cooperated" with them, he would be "immediately" fingerprinted, booked, and arraigned, and in addition, would suffer the loss of his pension as Administrative Assistant to the State Comptroller, after 40 years of accrued civil service.

He was specifically ordered not to say anything to anybody concerning his arrest. (13).

He had been entrapped into the commission of the alleged crimes charged against him, for which he was arrested on September 25, 1973 as aforestated, through NADJARI's use of an informant, one Nick DiStephano. He, STEINMAN, had first met DiStephano as a political helper back in 1965, but had hardly ever seen him since that time. (13-14).

In February, 1973, DiStephano approached him to try tohelp a "friend" of his, one Virginia Morgan, with regard to a gun charge to which she had pleaded guilty in the Kings County Supreme Court. "Virginia Morgan", appellant learned later, was the name used by a Federal undercover agent to

impersonate a non-existent criminal "defendant", as part of the scheme used by NADJARI to entrap others into the commission of criminal acts through the informant DiStephano. (14).

Unbeknown to appellant at any time prior to his arrest, DiStephano had a long criminal record. He is the same individual involved as defendant in the case of United States v. DiStephano, 464 F 2d 845 (2d Circuit, 1972), on a charge of subornation of perjury, and conspiracy to suborn perjury in a narcotic case.

At no time prior to his meeting DiStephano on February 20, 1973, the date alleged in the indictment, did STEINMAN ever solicit or receive any money from Mr. DiStephano, for political favor or otherwise, or for the purpose of a bribe or any illegal payment to anyone, at any time. Nor had he ever offered or paid a bribe to any public official or anyone else, at any time. (14).

During the entire three-month ordeal of his interrogation, threat and intimidation, as aforestated, from the day of his arrest to the date of his indictment, appellant was shuttled back and forth between NADJARI's office at the World Trade Center and the Office of the Assistant United States Attorney Rudolph W. Giuliani, Southern District of New York, in the Federal Building at Foley Square, where

this case had originated (14-15).

Throughout the entire period of time from September 25, 1973 to December 3, 1973, both NADJARI and Giuliani, and their agents and deputies, repeatedly attempted by threat, coercion and intimidation to have appellant booked, arraigned and fingerprinted "immediately", unless he cooperated with them to "get" and "set up" various named Judges and other public officials within the criminal justice system of Kings County, into the commission of acts of bribery and related crimes. (15).

Appellant was told to "get" any secretary to a Supreme Court Judge, introduce DiStephano to him, who would then take over, and appellant would be completely out of it from then on. (15).

He was repeatedly warned by NADJARI's office, led by Deputy Attorney General Mark Federman and Deputy Attorney General Steve North, in charge of the Brooklyn Office, in an extended interrogation lasting five hours, that he had better "cooperate".

Towards the end of the five hour interrogation, one of NADJARI's chief detective investigators, Don Kirby, placed two white fingerprint cards before him and warned him that "if you don't cooperate, I'll fingerprint you right now." (15-16)

During the course of approximately eight or nine sessions of interrogation and threats on the part of Giuliani

and his agents, appellant was directed to assist them in setting up "any" Supreme Court Judge through the informant DiStephano.(16)

Mr. Giuliani showed appellant a list of approximately 20 to 25 Supreme Court Judges in Kings County. In addition to that wanted list, Mr. Giuliani said that he also wanted Judge Sobel. When appellant informed him that Judge Sobel was not a Supreme Court Judge but a Surrogate, Mr. Giuliani said: "We want him". Mr. Giuliani also mentioned the name of Judge Koota whose name did not appear on the list of Brooklyn Supreme Court Justices that he showed appellant, (because Judge Koota had been then sitting in the Manhattan Narcotics Court), but Mr. Giuliani said also of Judge Koota: "We want him". (16).

Mr. Giuliani told appellant that he "wanted" to know who the "crooked ones" were in the District Attorney's Office of Kings County and the United States Attorney's Office for the Eastern District of New York. (16).

In the presence of Mr. Giuliani, Lt. Ahrens of the New York City Police Department stated to appellant that he was very much interested in Supreme Court Judge Oliver D. Williams and Judge Franklin Morton, Jr. who are Justices of the Supreme Court, Kings County. Appellant responded that he knew of no corrupt activities on the part of these judges or any other judge named by them. (66).

Mr. Giuliani also proposed that appellant "bug" the office of Mr. Meade Esposito, presently the Democratic County Leader of Kings County, stating that he, appellant, would be in a favorable position to place a "bug" in Mr. Esposito's office who was high on his "wanted list". (17).

Mr. Giuliani also wanted appellant to "set up" Arthur Brasco, the brother of Congressman Frank Brasco. The latter would introduce a special alien bill in Washington and he, Giuliani, would supply appellant with the alien's name as soon as possible, for the purpose of entrapping Congressman Brasco into receiving payment for the introduction of that bill. (17).

In a subsequent conversation with Giuliani, appellant was further told that he must "give" him, a judge, an assemblyman, a senator, a councilman and a congressman, in about a week. (17).

Participating in these discussions were members of the New York City Police Department, the Strike Force of the Federal prosecutor's office and at various times, members of NADJARI's office who had been cooperating with each other throughout. (17).

When appellant was originally interrogated in NADJARI's office by Mr. Federman, he was asked to contact one, Bernard Bloom, a District Leader in Kings County, and Assistant Dis-

trict Attorney Philip Lagana of Kings County, and to make arrangements with those named individuals for Mr. Lagana to buy a Criminal Court judgeship by making payment through appellant to Mr. Bloom. Mr. Federman told appellant, that, "as a starter", to get Meade Esposito and Frank Gilligan and that "he will clean up Kings County".

In all of these attemtps to entrap the individuals named by him and by Mr. Giuliani, appellant was informed that he would be outfitted with a recording device for the purpose of bugging all conversations that he was to have with them. (17).

Appellant told Mr. Federman, however, that he had no knowledge of any criminal activity having to do with any of the individuals that they had mentioned. (17-18).

Sometime in October, 1973, appellant met with the informant DiStephano at 140 Cedar Street, New York City. On that occasion, the latter said to him that he would take a "bus ride" if he did not produce a Supreme Court judge for them. Then he pointedly said to appellant, in the presence and hearing of several federal agents and the arresting officers of the New York City Police Department, Inspector Hess, Lt. Ahrens and Sgt. Powers, in words as follows: "<u>They got me. I got you. Now you get them</u>." (18)

About two weeks later, the said DiStephano and the

federal agents requested appellant to communicate with one Bernard Schwartz, who was described as the "bag man" for Justice Aaron E. Koota. He was instructed where and how to communicate with the said Schwartz. Appellant never knew or heard of that individual prior to this incident. He was told in this connection that they would bring a case before Judge Koota in the Narcotics Court in Manhattan in a very short time, and he, appellant, was to give the said Bernard Schwartz money to put a fix in that case. (18).

Notwithstanding the fact that appellant had never been involved in any crime or predisposition of crime of any nature whatsoever, both NADJARI and United States Attorney Paul J. Curran called a special news conference on the day of his arrest, September 25, 1973, and publicly announced through the press, radio and television that "Confidential information had led his staff to believe that Mr. Steinman may have previously been involved in cases like this"; and further prejudicially stated that "if a person has a propensity for one kind of a criminal act then the entrapment defense falls." (New York Times, December 20, 1973). (18).

All of the conversations appellant had had with DiStephano were electronically recorded, and the tapes are now in the physical possession and control of NADJARI's office. Such tapes will absolutely confirm the truth of

appellamt's statement to this Honorable Court, under oath, that he had been entrapped into the commission of the alleged crimes charged against him, at the instigation and direction of Mr. Giuliani and NADJARI, from the very inception of his first contact with the said informant. (19).

In a supporting affidavit for a three-judge Court, counsel for appellant further alleged substantially as follows:

The trial of the indictment and all pre-trial proceedings relating thereto are now pending before the Hon. John J. Murtagh, Justice of the Supreme Court, appointed by the Governor of the State of New York, under the authorization of Section 149, Subd. 2 of the Judiciary Law, and of Article 6, Section 27 of the New York State Constitution, which provided as follows:

> "Sec. 27. Extraordinary terms of the Supreme Court.
>
> The Governor may, when in his opinion the public interest requires, appoint extraordinary terms of the Supreme Court. He shall designate the time and place of holding the term and the justice who shall hold the term. The Governor may terminate the assignment of the justice and may name another justice in his place to hold the term."
>
> "Section 149. Governor may appoint extraordinary terms and name justices to hold them.
>
> 1. ****
>
> 2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in

> the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division." (26).

In pursuance therewith, the Honorable J. Irwin Shapiro, Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department, granted an order on January 25, 1974, authorizing STEINMAN, to bring the follcwing preliminary motions, among others, directly before a term of the Appellate Division.

1) For an order dismissing the indictment in the furtherance of and in the interest of justice, under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States and Art. 1, Sec. 6 of the New York State Constitution. (23, 26).

2) For an order pursuant to Section 210.20 subdivision 1(h) of the Criminal Procedure Law dismissing the indictment on the specific ground that NADJARI had grossly abused and violated the jurisdictional scope of his statutory power and authority vested in him through Article VI, Section 27 of the Constitution of the State of New York, Section 63 of the Executive Law and Governor's Executive Order No. 58 dated September 19, 1972, and the due process clause of the Constitution. (27).

3) For an order disqualifying Hon. John M. Murtagh, presiding justice of the Extraordinary Special and Trial Term from presiding at the trial of the action herein, if any, and staying the trial of this action until the appointment of another Justice in his place, or the designation of an additional Extraordinary and Special Trial Term by the Governor pursuant to specific authorization contained in Article VI, Section 27 of the New York State Constitution and Section 149 of the Judiciary Law and the due process clause of the Constitution. (17).

4) For an order superseding and disqualifying NADJARI and any member of his staff, from managing and conducting the further prosecution of STEINMAN, and for an order requesting the Governor and/or the Attorney General of the State of New York to supersede the said NADJARI as Special Prosecutor therein. (17).

5) For an order granting discovery to STEINMAN, pursuant to Section 240.20 and Section 240.40 of the Criminal Procedure Law. (27).

6) For an order, forthwith, directing the impounding by the Clerk of the Appellate Division, of all original tapes of electronic recordings and all intercepted telephone recordings, and all official reports based thereon, all written reports, statements and memoranda of interviews

between STEINMAN and any member of the Office of the Special Deputy Attorney General NADJARI, and with all persons acting under his direction or in cooperation with him, including specified participating members of the Internal Affairs Division of the New York City Police Department, and the specified participating members of the U.S. District Attorney of the Southern District of New York, pending the further order of the Appellate Division. (28).

In support of the said motion to dismiss the indictment, it was further set forth as follows:

The deliberate unsealing of the filed papers by the prosecution in direct defiance of the Court's order of January 28, 1974, gravely imperilled appellant's constitutional rights to a fair and impartial trial. (35-36).

This new spate of newspaper notoriety was of the same pattern as the false and prejudicial public statements adversely reflecting on appellant's alleged criminal predisposition, widely disseminated in the media of the press, television, and radio, in a joint news conference held by Mr. Nadjari and United States Attorney Paul Curran, attendant STEINMAN's arrest under the indictment on December 19, 1973. This advance publicity was in flagrant violation of the Code of Professional Responsibility promulgated by the American Bar Association August, 1969, adopted by the

be laudatory, he is not above the law and may no

New York State Bar Association effective January 1, 1970 (McKinney's Judiciary Law, Book 29) Disciplinary Rule 7-107.

Particularly shocking, Mr. Nadjari's Chief Assistant, Special Deputy Attorney Joseph A. Phillips wilfully, falsely and fraudulently represented to the Appellate Division of the Supreme Court, during oral argument on the appellant-defendant's omnibus motions aforesaid, that Chief Judge Stanley H. Fuld had expressly sanctioned and authorized the use of mock arrests and make-believe convictions as an acceptable prosecutorial device, involving the systematic use of perjured testimony and suborned perjury, on a wholesale scale.

However, Judge Fuld subsequently advised appellant's counsel that he had never sanctioned or approved that procedure. at any time.

Judge Fuld further advised appellant's counsel that again on April 5, 1973, Mr. Nadjari's office specifically requested permission to utilize that prosecutorial device, but that he would not and could not sanction or approve such a tactic. Though Mr. Phillips subsequently advised the Appellate Division that his original statement to the Court that Chief Judge Fuld had authorized this technique of perjury was "inadvertent error" due to a "misunderstanding" regarding the original discussions concerning this matter be-

able way--by removing the incentive to

tween the Chief Judge and the then U.S. Attorney Whitney North Seymour, (54), the fact is that Mr. Nadjari's office had been directly informed by the Chief Judge as late as April 5, 1973, withoutequivocation that he would not and could not sanction such practice, as aforestated. (59-60. 83). Yet, Mr. Phillips falsely and also misleadingly represented to the Court that "at no time did Chief Judge Fuld communicate 'explicit disapproval' to this office or to the United States Attorney." (71).

Moreover, at no time did Judge Fuld ever approve or authorize such prosecutorial tactic in this case. (80-83).

On May 20, 1974, the Appellate Division rendered its decision, denying appellant's various motions to dismiss the indictment on due process grounds for the prosecutorial misconduct of NADJARI, to supersede and disqualify NADJARI, to dismiss the indictment on jurisdictional grounds, to disqualify Judge Murtagh from presiding at the trial of the criminal proceeding, and denying appellant's application to stay all proceedings pending the appointment of another presiding Justice of the Extraordinary Special and Trial Term. (37-38)

In adopting the concurring opinion of Mr. Justice Shapiro in a companion case, Matter of Klein v. Murtagh, 44 App. Div. 2d 465 , decided therewith, the Court stated:

> "Shapiro, Acting P.J. (concurring). I concur in the carefully considered opinion of Mr. Justice Munder, but I should like to make it clear that in

dismissing the petitions we have not reached or passed upon the petitioners' contention that the lawless conduct of the investigators in this case is so offensive to the administration of justice and to prevailing standards of decent behavior that this prosecution should be barred.

While I am in general agreement with the disapproval voiced by Judge Friendly in United States v. Archer (486 F 2d 670) of the prosecutorial conduct of the Government (both State and Federal), the question of whether such conduct constituted government induced criminality (Sherman v. United States, 356 U.S. 369), or was otherwise of such a nature as to violate principles of fundamental fairness sufficient to preclude the prosecution of the petitioners (Rochin v. California, 342 U.S. 165), or whether the indictment should be dismissed in the interest of justice (CPL 210.40), should be decided at the trial level on a full record containing all the essential facts showing the manner in which the events leading to the prosecution of the petitioners were planned and carried out. The determination of these questions cannot properly be made on an application for an order in the nature of prohibition."

In the District Court below, the appellant contended that to relegate the appellant, to a trial or hearing before Judge Murtagh, would be highly prejudicial to his constitutional right to a fair and impartial trial. (38-39).

In a Supplemental Affidavit submitted to the District Court below, following oral argument of the appellant for a 3-judge court, appellant further stated:

Upon the oral argument of the plaintiff's application for a three-judge Court pursuant to 28 USC 2281 and 2284, which the Court denied

by order entered August 8, 1974, your affirmant specifically contended that the statute under which the Extraordinary Special and Trial Term of the Supreme Court was convened by the Governor, Section 149 of the Judiciary Law of the State of New York, was inherently violative of the Separation of Powers doctrine guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, in that by its terms, the Governor is granted the unlimited power to terminate at will the appointment of the Judge presiding thereat, and to replace that Judge with another at any time and for any reason, and that, therefore, the said statute, as well as its counterpart, Article 6, Section 27 of the New York State Constitution, are unconstitutional and void on their face, as violative of the independence of the judiciary and of the due process rights of this plaintiff to a fair and impartial trial before a court so constituted.

Subsequent to the oral argument as aforestated, the affiant commenced an independent action in the

[illegible] the case the State has against his

Supreme Court of the State of New York, County of Kings, for a Declaratory Judgment to declare the said statute and constitutional provision unconstitutional and void upon their face.

The plaintiff hereunto annexes as Exhibit A herein, a true copy of the action for Declaratory Judgment aforestated, now pending in the Supreme Court of the State of New York, County of Kings, as aforestated. Also annexed hereto as Exhibit B. is a true copy of the Plaintiff's Memorandum of Law filed therewith.

In this connection, the patent and flagrant unconstitutionality of the statute in issue warrants federal intervention to prevent irreparable injury to the Plaintiff flowing from a "trial" in an unconstitutional court so convened (Younger v. Harris, 401 U.S. 37; Mitchell v. Foster, 407 U.S. 225).

In the latter case, the United States Supreme Court stated:

> "In Younger, this Court *****clearly left room for federal injunctive intervention in a pending state prosecution in certain exceptional instances----where irreparable injury is 'both great and immediate', 401 U.S. at 46, 27 L Ed 2d at 676, where the state law is 'flagrantly and patently violative of express constitutional prohibitions,' 401 U.S. at 53, 27 L Ed 2d at 681, or where there is a showing of 'bad faith, harassment, or..... other unusual circumstances that would call for

equitable relief. (401 U.S. at 54, 27 L Ed 2d at 681." (emphasis ours).

Due to the institution of the criminal proceeding against him under the unconstitutional statute aforestated, the Plaintiff has been forced to expend his financial resources to defend that action, and to prosecute the action in this federal court for a declaratory judgment and injunctive relief under the Due Process Clause of the Constitution, as well as the action in the state Supreme Court of Kings County to declare the statute unconstitutional under the Separation of Powers doctrine, as aforestated.

The Plaintiff is now deeply in debt, and has left barely any savings. His sole income is from a pension as state employee, which goes entirely for his basic needs of subsistence for himself and family. He is presently obligated to pay the huge expenses and legal fees involved in the taking of any appeals from each of these pending cases. Since he is without financial resources, and could not qualify as an "indigent" for the purpose of appellate assistance from the courts, the Plaintiff now faces the unjust and unacceptable alternative of being forced to abandon his right to defend and

his right to appeal, unless this federal court intervenes to prevent this ireparable injury to him. (94-96).

POINT I.

THE EXTRAORDINARY CIRCUMSTANCES CONCLUSIVELY ADDUCED AT BAR WARRANTED EQUITABLE INTERVENTION UNDER THE FEDERAL DECLARATORY JUDGMENT ACT FOR INJUNCTIVE RELIEF, UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

The Extraordinary Circumstances

The tests of "special circumstances" and "irreparable injury" laid down in the guiding precedent of Younger v. Harris, 401 US 37, 45, have been amply met in the conclusively documented allegations of prosecutorial misconduct set forth in the appellant's action for a Declaratory Judgment in the District Court below.

Rarely in all prosecutorial experience in this country has "the ignoble shortcut to conviction" (Mapp v. Ohio, 367 US 643, 660) descended to the levels enumerated here, enveloping the very integrity of the judicial process and the administration of criminal justice.

Seldom in all the annals of criminal jurisprudence has a prosecutor so flagrantly abused the lawful limits of power and authority as in the case at bar.

It is surely "extraordinary" and "unusual circumstances"

(a) to employ the art of entrapment as a standard, routinized prosecutorial device in a civilized society under the rule of law; (b) to coerce the entrapped victim by threat and terror, to entrap others; (c) to wilfully deny to an accused his constitutional right to any arraignment whatsoever, during a "critical stage" of the criminal proceedings against him (Coleman v. Alabama, 399 U.S. 1); (d) to commit wholesale perjury and to suborn perjury in the criminal courts and grand juries through the manufactured device of pseudo-arrests and pseudo-convictions of undercover "defendants" for the purpose of entrapping others, without any authority or sanction of law whatever; (e) to falsely represent to the courts that he, NADJARI, had received the express authorization, sanction and approval of the Chief Judge Stanley H. Fuld for the deployment of staged arrests and fake convictions, when in truth and in fact, he had no such permission, and indeed, Judge Fuld had explicitly rejected NADJARI's specific request for approval or sanction of such tactics in April, 1973 (80-83); and (f) to systematically disseminate grossly false and seriously prejudicial publicity against the accused, this appellant, regarding his alleged, but non-existent predisposition to crime, in flagrant violation of the Code of Professional Responsibility promulgated by the American Bar Association.

In the totality of these conclusively documented practices,

we respectfully submit that prosecutorial misconduct so shocking to the conscience and so inherently violative of the Due Process Clause, amply meets the test of "extraordinary circumstances" (Younger v. Harris, supra); "unusual situations", (Samuel v. Mackell, 401 U.S. 66, 67); and "bad faith enforcement or other special circumstances" (Steffel v. Thompson, ____ U.S. _____, 14 CrL 3123) which would warrant federal intervention by declaratory and injunctive relief.

What gravely aggravates these outrageous practices of "government-induced criminality" is that they were carried on, despite the express admonition by this Court in Archer, to these very same law enforcement officials that their continuance might warrant sanctions under the Due Process Clause of the Constitution. It will be noted that Mr. Nadjari appeared as amicus curiae in that case (United States v. Archer, 486 F 2d 670 (CA 2, 1973); see People v. Rao, ____ A.D. 2d ____ (2nd Dept. NYLJ Dec. 13, 1974).

Further, the agent provocatour and professional entrapper employed at bar, Nick DiStephano, was the very same individual who had played an identical role in Archer; likewise, the very federal prosecutor, Assistant United States Attorney Rudolph W. Giuliani, with whom this case had originated, was the same law enforcement officer who had prosecuted Archer; and finally, that the cooperative police units here

involved were identically the same as in Archer.

Certainly, it is "bad faith" and "harassment" to use the device of entrapment as a wholesale, systematic tactic of prosecution to entrap an individual into arrest, without ever intending to book or arraign him in a court of law; to lawlessly keep the arrestee hostage, by psychological torture, as a vehicle for the mass entrapment of innocent judges and other public servants within the criminal justice system under threat that if he failed to "cooperate" in "getting" any Supreme Court Justice and others, he would be "immediately" fingerprinted, booked and arraigned.

Certainly, it is "bad faith" and "harassment" to practice perjury, subornation of perjury and deception through the lawless device of manufactured arrests and contrived convictions of federal undercover "defendants" -- especially, where at bar, (a) the very same principals here involved, namely, the appellee NADJARI and Assistant United States Attorney Giuliani, using the identical informant Nick DiStephano, had been forthrightly forewarned by this very Court in Archer to desist therefrom; and (b) both appellee NADJARI and Mr. Giuliani had falsely represented to the Court , in the very case at bar, that Chief Judge Stanley H. Fuld had explicitly authorized the use of mock arrests and convictions of undercover "defendants", whereas in truth and in fact, he had never

sanctioned the practice, and indeed, in April, 1973, had flatly refused permission to the appellee NADJARI to engage in such illegal techniques.

Certainly, it is bad faith-harassment, shockingly violative of the Canons of Professional Respectability to propagate false and prejudicial statements, in a public news conference, that appellant had a "criminal predisposition", when in truth and in fact he had never been involved in any criminal or unlawful activity whatsoever prior to his entrapment.

The prejudicial impact of the falsity so widely disseminated against appellant regarding his alleged criminal predisposition, is that potential character witnesses who might have been available to testify on his behalf as character witnesses to support his claim of entrapment and predisposed innocence, may now no longer be available to him in the light of Mr. Nadjari's deliberate falsifications of alleged fact.

The gross prosecutorial misconduct at bar--conclusively proven by the total denial of appellant's elemental rights to the right of counsel and a preliminary hearing in a court immediately after his arrest, and the Gestapo inquisition to which he was subjected to try to force him into entrapping others is plainly shocking to the conscience and inexcusably offensive to the canons of decency in our civilized society.

Entrapment, in and of itself, deeply offends "the highest public policy in the maintenance of the integrity of administration . . .It is abhorrent, to the sense of justice", declared Chief Justice Charles Evans Hughes, writing for the Court in Sorrells v. United States, 287 US 435, 446-8.

Further, said Mr. Justice Hughes:

> "...such an application (entrapment) is so shocking to the sense of justice that it has been urged that it is the duty of the Court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts."

In Sherman v. United States, 356 US 369 (1958)) Chief Justice Warren stated:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." (Sorrells v United States, 287 US at 442).
>
> "Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." (emphasis ours).

This Court forthrightly stated in United States v. Archer, 486 F 2d 670, in a setting identical to the case at bar:

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which in-

volved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any prosecutorial role and needlessly injected the Federal government into a matter of state concern."

As to the entrapment issue, the Court pointedly added:

"...Our intuition inclines us to the belief that this case would call for application to Mr. Justice Brandeis' observation in OLMSTEAD, even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.**** Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part." (Underscoring ours).

In Russell v. United States, supra, quoted by this Court in Archer, at . 676, Mr. Justice Rehnquist expressed the following caveat, 411 U.S. at p. 431, namely, that the Court might:

"some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 US 165, 72 S.Ct. 205, 96 L ed. 183 (1952)...."

We earnestly submit to the Court that the case at bar presents precisely such a situation.

As Mr. Justice Brandeis stated in his classic dissent in Olmstead v. United States, 277 US 438:

> "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example * * *. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

In Terry v. Ohio, 392 US 1, 12-13, Chief Justice Warren said for the Court:

> "The rule also serves another vital function--'the imperative of judicial integrity'. (Elkins v. United States, 364 US 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."

In People v. Paul P. Rao, People v. Paul P. Rao, Jr. and In the Matter of Salvatore Nigrone, the Appellate Division of the Second Department, ___AD 2d___NYLJ, Dec. 13, 1974, once again condemned this practice as did this Court in Archer, and recently declared as follows:

> "The deception of grand jurors, Judges and Assistant District Attorneys and the filing of false official documents are absolutely intolerable.***When, as here, the criminal justice system is made an unwitting accomplice of an overzealous prosecutor, before the fact, its impartiality is destroyed and contempt for the law encouraged.****

Though the purpose of the Special Prosecutor may

be laudatory, he is not above the law and may no more resort to corruption and manipulation of the criminal justice system than the individual he seeks to prosecute."

Mr. Justice J. Irwin Shapiro, in an opinion holding that the indictment should be dismissed under the Due Process Clause, further held:

"The myopic view of the Special Prosecutor with regard to his conduct destroys the contention of the majority that we have here a sui generis case and that its condemnation 'will suffice to prevent its repition'. In this connection it should be remembered that almost exactly the same kind of conduct was severely condemned in United States v. Archer (486 F.2d 670), a case in which the Special Prosecutor here participated as amicus curiae.*****

A dismissal of the indictments here would not hamper proper investigative procedures, but would serve notice that JAVERT type techniques which utterly disregard basic constitutional rights, violate statutory law and constitute an intrusion on those rights which we as a free people hold most dear may not be perpetrated with impunity. We must set our face unalterably against lawless law enforcement as a proper device to be used by prosecutors even if their motives be of the best---for sanctioning them can only have a chilling effect on proper law enforcement and result in the eventual erosion of many of our basic constitutional rights."

The broad deterrent purpose of the judicially-designed exclusionary rules is "to deter further unlawful police conduct". (UNITED STATES V. CALANDRA, ___ US ____. January 8, 1974, 14 CrL 3061); WEEKS V. US, 232 US 383; MAPP V. OHIO, 367 US 643 "The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively avai-

able way--by removing the incentive to disregard it." (ELKINS V. UNITED STATES, 364 US 206, 217 (1960. (App. p. 29).

We respectfully submit that the same cathartic rules promulgated by the United States Supreme Court to discourage and deter police misconduct in the suppression of illegally seized evidence and coerced confessions are no less applicable to deter the revolting official misconduct practiced by the appellee NADJARI at bar.

The fruits of such misconduct--the indictment herein--should be declared null and void under the Fifth and Fourteenth Amendments of the Constitution, and the state prosecution against appellant should be permanently enjoined in order to deter future unlawful police conduct of this nature. (Wong Sun v. United States, 371 US 471; Silverthorne Lumber Co. v. United States, 251 US 385.)

In United States v. Huss, et al., ____F 2d____ (CA2 1973) this Court stated:

> "Of course, we all suffer when, in Cardozo's classic phrase, the criminal goes free because the constable has blundered. The remedy, however, is to help the constable not to blunder.
>
> The problem of crime, in particular, the diabolic crimes charged in the indictments herein, is of great concern to us. But if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end."

Accord: United States v. Drummond, 481 F 2d 62 (CA 2,1973); United States v. Archer, 486 F 2d 670 (CA 2, 1973); United States v. Heath, 260 F 2d 623.

Court's attend[illegible] [illegible] of

Long ago, the Supreme Court stated, in United States v. Lee, 106 US 196, 220, 1 S Ct 240, 261, 27 L Ed 171:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Directly applicable here is the exclusionary rule enunciated in Weeks v. United States, 232 US 383, wherein the Court laid down the guiding rule:

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

And, as the Court later said in Mapp v. Ohio, supra:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

POINT II.

APPELLANT HAS BEEN IRREPARABLY INJURED IN THAT HE HAS BEEN DEPRIVED OF AN ADEQUATE REMEDY AT LAW AND OF ALL MEANINGFUL ACCESS TO THE STATE COURTS.

A. The Denial Of Counsel or Of Any Arraignment

The prerequisite showing of irreparable injury, "resulting in a deprivation of meaningful access to the state courts" (Allee v. Medrano, ___US ___ 94 S Ct. 2191, 2210 (1974), was here conclusively established in the District Court below:

The appellant was totally deprived of the right to counsel during a critical stage of the proceedings against him, and the right to a preliminary hearing. In depriving him of these elementary rudiments of due process, appellant's fundamental rights to a fair trial have been irretrievably lost.

In Coleman v. Alabama, 399 US 1, the Court stated:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial.

> Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. The ability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid (of counsel as at the trial itself. Powell v. Alabama, supra, at 57, 53 S Ct at 60."

Here, no less than in Coleman, appellant was deprived of the right to counsel by short-circuiting an arraignment altogether.

Further, quoting from a textbook, Criminal Procedure in Alabama, by M. Clinton McGree (University of Alabama Press 1954, p. 41), the Coleman Court added, in ff.3:

> "It (a preliminary hearing) also safeguards the accused against groundless and vindictive prosecutions, and avoids for both the accused and the State the expense and inconvenience of a public trial."

In Coleman v. Burnett, supra, likewise, the Fifth Circuit Court of Appeals stated:

> "The Sixth Amendment's guaranty of counsel is a pledge of effective assistanceby counsel, and Coleman makes it clear that federal preliminary hearings, as critical stages of criminal prosecutions, require no less.***"
>
> "To put in a nutshell what we later elucidate, Coleman identifies the constitutional right to

effective assistance of counsel as an incident of preliminary hearings and assures vindication of that right. It is evident, then, that the return of an indictment against the accused cannot eliminate the need for procedures of some kind to redress violations of the Coleman right (P. 1209)*** In our view, where an unmitigated blunder at a preliminary hearing may infect the ensuing trial, the court is obligated to scrutinize the accused's claim of possible injury, and to take appropriate action." (P. 1211) (Underscoring ours)

In a footnote thereto, the Court further noted:

"In Chapman v. California, 386 US 18 (1967), it was held that before a federal constitutional error can be held 'harmless', the court must be of the belief that it was harmless beyond a reasonable doubt. 386 US at 24, 87 S.Ct. 824. The Court must find that there is no reasonable possibility that the error complained of might have contributed to the conviction." (ff. 158, p. 1210).

Accord: State v. Vaughn, 74 N.M. 365, 393 P.2d 711; State v. Rogers, 31 N.M. 485, 247 p. 828; State v. Vega, 78 N.M. 525, 433 p. 2d 504.

New York Criminal Procedure Law Sec. 140.20

requires that a police officer

"upon arresting a person without a warrant must*** without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question."

New York Criminal Procedure Law, Sec. 180.70

subd. 4, provides:

"If there is not reasonable cause to believe that the defendant committed any offense, the court must dismiss the felony complaint and discharge the defendant from custody if he is in custody,

was replaced by a new subdivision 2, now consistent

or, if he is at liberty on bail, it must exonerate the bail."

Under Section 180.60 of the New York Criminal Procedure Law, each witness at the preliminary hearing, whether called by the people or by the defendant, may be cross-examined; the defendant may, as a matter of right, testify in his own behalf; and, upon his request, the court may permit him to call and examine other witnesses or to produce other evidence in his behalf.

By depriving appellant of a preliminary hearing altogether, the appellee prevented him from establishing through counsel, that there was no "reasonable cause to believe that he committed a felony". At such hearing, appellant would have been clearly entitled to prove, and would have proved, through electronic tapes in NADJARI's possession or control, of all conversations with the informant, that appellant had been indeed entrapped, as a matter of law. New York Penal Law Sec. 40.05; see Butts v. Town Justices, 37 AD 2d 607, 323 NYS 2d 619 2d Dept. 1972; Pitler, New York Criminal Procedure Law, pp. 204-209; Coleman v. Burnett, 477 F 2d 1187 (CA 5, 1973); United States v. King, ___F 2d ___ (CA, DC (1973) 13 CrL 2048).

Even more egregiously, appellant was deprived of a singular opportunity to perpetuate the original tapes of all conversations upon the record of the preliminary hearing,

and thus to preserve them absolutely inviolate against any possible spoliation, loss or erasure. In sum, appellant suffered irreparable injury in this respect by the deliberate circumvention of a hearing for almost three months, although no indictment had been found in the interim.

Though appellant's application to impound the original tapes, after indictment, was denied by the Appellate Division, (32, 37), the Court did informally direct the appellee to keep and maintain the tapes in his "safe" custody.

However, we respectfully submit that in withholding the right of a preliminary hearing from appellant, he had been irreparably injured with respect to the most critical evidence in appellee's possession which could and would have established appellant's claim of entrapment, as a matter of law.

It will be noted that nowhere in the opinion of the District Court below did it expressly consider or evaluate the grave irreparable injury to appellant posed by the failure to accord him the right of counsel, or of a due arraignment in a court of law, during a critical stage of the proceedings against him under the Coleman standard of due process.

Indeed, flatly contrary to the teachings of Coleman, the appellee misleadingly contended in the Court

below, as follows:

> "The right to a prompt preliminary hearing or arraignment is a state, not a federal, right. (Def. Supp. Brief in Support of Motion to Dismiss, p. 8).

Appellant's basic contention below, however, was not structured on the mere premise of a "delayed" arraignment, or even on the mere denial of a preliminary hearing, but on the deliberate denial of the right of counsel at that critical stage of the criminal proceedings against him.

B. The Facial Unconstitutionality of the Statute Directly Affecting the Jurisdiction and Legal Competence of the State Court.

Above all, the state prosecution at bar is fatally infected with a statute which is unconstitutional on its face, going to the very jurisdiction and competence of the Court, in two-fold respects, as follows:

(a) It is inherently violative of the independence of the judiciary; (Judiciary Law, Sec. 149, subd. 1)

(b) It is inherently violative of an accused's right to due process and the equal protection of the laws, (Judiciary Law, Sec. 149, subd. 2) in that it substantially diminishes the rights of all litigants before the Extraordinary Term of the Supreme Court. (cf. People ex rel. S.L. & T. Co. v. Extraordinary Term of

Supreme Court, 220 NY 487 (1917), opinion Cardozo, J.;

Matter of Reynolds v. Cropsey, 241 NY 389 (Appendix, pp. 9[illegible]-96)

The State Statute is Facially Violative of the Independence of the Judiciary.

Section 149, subdivision 1 of the Judiciary Law, as amended by L. 1939, ch 1, provides as follows:

> "Section 149. Governor may appoint extraordinary terms and name justices to hold them
>
> 1. The governor may, when in his opinion the public interest requires, appoint one or more extraordinary special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, and he must give notice of the appointment in such manner as, in his judgment, the public interest requires. The governor may terminate the assignment of the justice named by him to hold a term appointed pursuant to this section, and may name another justice in his place to hold the same term. * * *" (Emphasis supplied)

In the absolute power thus vested in the Governor to appoint and to remove at will, any judge designated by him to hold the extraordinary special and trial term of the supreme court, both Article 6, Section 27 of the New York State Constitution and Section 149 of the Judiciary Law are unconstitutional and void, on their very face, as inherently violative of the independence of the judiciary, and the Separation of Powers guaranteed against encroachment by the Due Process Clause of the Fifth and Fourteenth Amend-

ments of the Constitution of the United States and Article 1, Section 6 of the New York State Constitution.

We respectfully call the Court's attention to the fact that the statute in issue, Section 149 of the Judiciary Law, as well as its counterpart constitutional provision, have never been subjected to any test of constitutionality by any appellate tribunal, other than as now being undertaken here.

However, the landmark case of People ex rel. The Saranac Land & Timber Co. v. The Extraordinary Special and Trial Term of the Supreme Court, 220 NY 487 (1917) is in implicit support of the unconstitutionality of Sec. 149 of the Judiciary Law and Art. 6, Sec. 27 of the New York State Constitution.

There, Judge Cardozo, writing for a unanimous Court, upheld the Governor's constitutional power to appoint an Extraordinary Special and Trial Term of the Supreme Court, as authorized by the then Sec. 153 of the Judiciary Law, now re-numbered Sec. 149 of the Judiciary Law. Its decision comported with its own prior precedents in People v. Gillette, 191 N.Y. 107; People v. Neff, 191 N.Y. 210; People v. Shea, 147 N.Y. 78.

However, the statute, as it then read, did not contain the constitutionally offensive limitation later engrafted by L. 1939, ch. 1 as aforestated, empowering the

Governor at his pleasure or whim to terminate the assignment of the justice named by him, and to name another in his place, at will. It is crystal clear from a reading of the Court's opinion in Saranac, supra, therefore, that the authoritarian Section 149 of the Judiciary Law and Art. 1, Sec. 6 of the New York State Constitution would never have passed constitutional muster in the Cardozo court.

The fatal flaw of the statute in issue is not that the Governor had overly played musical chairs with the independence of Judge Murtagh, or even threatened to replace his appointee for another, but that in its in-built potential for autocratic control over any judge appointed to do the governor's bidding, it is unconstitutional per se.

> "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done." Stuart v. Palmer, 74 N.Y. 183, 189.

And again, in Rosalsky v. State, 254 N.Y. 117 (1930):

> "We measure the validity of statutes, not by what has actually been done under cover of their provisions, but by what with reason may be done. Stuart v. Palmer, 74 N.Y. 183, 30 AM. Rep. 289; Matter of Richardson, 247 N.Y. 401, 421, 160 NE 655."

In People v. Klinck Packing Co., 214 N.Y. 121, 138-139, (1915), the Court reiterated the applicable rule:

> "* * *we are to judge of a statute by what is possible under it."

The constitutionality of a measure depends not on the degree of its exercise but on its principle. (Providence Bank v. Billings, 29 U.S. 514).

The doctrine of Separation of Powers in our constitutional system of government by checks and balances is a "bulwark against tyranny" (United States v. Brown, 381 US. 437 (1965).

Accord: (O'Donohue v. U.S. 289 US 516; Kilborne v. Thompson, 103 U.S. 168, 190; Springfidd v. Philippine Islands, 177 U.S. 189, 201; Federalist Papers No. 47, 48, 51.)

The gravely pernicious potentials of the statute in issue are readily apparent.

Under this plainly unconstitutional statute, the independence of the judiciary is automatically subjugated to the control, whim and caprice of the Executive. Under its very terms, any Judge so designated--where the Executive is so firmly "in control of judicial action" (People ex rel S.L. & T. Co. v Extraordinary Term, supra), would be inevitably impelled to tilt the balanced scales of justice against any accused--if only to curry the favor on the one hand, or avert the displeasure on the other, of the Governor.

Even more egregiously, by designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive (infra, pp.59-61) the Governor has not only magnified manifold the potential dangers

of Section 149 of the Judiciary Law to the independence of the judiciary, and to the due process rights of an accused, but has likewise rendered Section 63 of the Executive Law and Executive Order No. 58 issued thereunder, unconstitutional and void, as applied, under the Due Process Clause of the Constitution.

The unprecedented imperial power vested in the Governor by Section 149 of the Judiciary Law would inevitably tend to invite, encourage and tolerate the very tyrannical abuses practiced by the appellee at bar, not only against this appellant, but against all others similarly situated.

In a court of justice so heavily stacked against the accused, with the Governor holding the strings of both the judge and prosecutor, the elemental rights to a fair trial are hopelessly compromised.

With the utmost deference and respect for the Hon. John M. Murtagh, Justice Presiding of the Extraordinary Term, we respectfully submit that by every rule of logic and reason, a judge so situated could not reasonably maintain the balance true, despite the best of intentions and the highest nobility of motive.

In the light of the unconstitutional statutes aforesaid, we respectfully submit that the District Court erred in holding that "Plaintiff has a forum where he can

assert these due process violations.", and in overruling appellant's contention that he has no adequate or meaningful rememdy at law in the state courts.

To relegate appellant to a trial before the Judge presiding in the Extraordinary Term, be it Judge Murtagh or any other designee of the Governor, would be patently prejudicial to his constitutional right to a fair and impartial trial.

A resolution of the critical issues propounded by the appellant, engendered by the extraordinary prosecutorial misconduct shown at bar, would necessarily require the Court to pass judgment upon such finely, super-sensitive issues as the pending motions therein (a) to disqualify the appellee as the prosecutor in this case, upon the ground that neither he or any other defendant could get a fair trial at his hands under the shocking misconduct already evidenced at bar; (b) to dismiss the indictment under the Due Process Clause of the Constitution as a judicial sanction to protect the integrity of the judicial process and the rule of law; (c) to dismiss the indictment for the gross abuse of jurisdiction arrogated by NADJARI in the systematic manufacturing of crime in order to prosecute it; (d) to disqualify Judge Murtagh and to stay the trial until the appointment by the Governor of another Presiding Justice to preside over the

trial of this plaintiff, under the specific authorization of Section 149, subd. 2 of the Judiciary Law of the State of New York.

Above all, by relegating appellant to seek redress before the Judge presiding over the facially unconstitutional Extraordinary Term, for a disposition of the manifold contentions at bar, and more particularly, for a special ruling on the constitutionality of the statutes under the Separation of Powers doctrine, and under the equal protection of the laws, would implicate Judge Murtagh in an untenable situation in which he, in effect, would be called upon to invalidate the very Court over which he presided.

To expect Judge Murtagh, or any other judge, to maintain an even balance between the appellant and appellee under these unique and extraordinary circumstances, would be to strain for the fulfillment of the impossible from any human being.

Indeed, we further respectfully submit, that if appellant's contention as to Separation of Powers is correct, as we humbly submit it is, then the Extraordinary Term of the Supreme Court is utterly without power or competence even to resolve that issue, or any other, as an illegally constituted court.

In this connection, we respectfully call the

Court's attention to the fact that appellant has instituted an action for Declaratory Judge in the Supreme Court, County of Kings, on that very issue. The Court at Special Term dismissed the action on appellee's principal contention that that issue should be resolved solely by Judge Murtagh in the Extraordinary Term. An appeal from that decision is now pending, taken as of right on constitutional grounds, to the New York Court of Appeals, pursuant to Art. 6, Sec. 3b New York State Constitution and pursuant to Civil Practice Law and Rules 5601 (b) (2). (See Dreyer v. Illinois, 187 U.S. 71, 84).

In sum, it would be patently violative of the Fifth and Fourteenth Amendments to the Constitution to relegate appellant to a determination of these critical issues by the unconstitutionally-tainted Extraordinary Term of the State Supreme Court.

With the utmost deference and respect for Judge Murtagh, the recent decision by the Appellate Division of the First Department, in People v. Bell, 357 N.Y.S. 2d 539 (July 9, 1974), unanimously reversing a judgment of conviction obtained by the defendant NADJARI in the Extraordinary Term of the Supreme Court, is highly illustrative of the inadvertent psychological pressures operative against a fair trial for any accused in the Court constituted under the unconstitutional statutes here in issue.

There, reversing a conviction of a police officer

intervention in a pending state [illegible] upon the

for Attempted Possession of a Dangerous Drug in the First Degree, Burglary in the First Degree and Attempted Grand Larceny in the Second Degree, with concomitant sentence of six to eighteen years in prison, the Appellate Division held:

> "On this record, it is clear that the totality of the trial court's errors was prejudicial and, in effect, denied defendant-appellant Richard Bell a fair trial. * * *
>
> "Read as a whole, the charge was prejudicial in that it appeared to emphasize the strength of the prosecution's case, in derogation of the requirement to give balanced instructions to the jury in a criminal trial. * * *" (Underlining ours)

Of the same tenor, see also, People v. Harding, ___ AD 2d___ (1st Dept 1974) 355 NYS 2d 394)

In re Murchison, 349 U.S. 133 (1965), the Supreme Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L. ed. 749, 758, 47 S. Ct. 437, 50 ALR 1243. Such a stringent

Fourteenth Amendment of the Constitution (Katzenbach v.

rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11." (emphasis ours.)

In United States v. Walker, 473 F 2d 136 (CA, DC. 1972), the Court perceptively noted:

"The disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious."

In Frischling v. Schrank, 24 App. Div. 2d 462, the Court stated:

"The right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial."

The State Statute Is Facially Violative of the Equal Protection Clause of the Fourteenth Amendment.

Every litigant before the Extraordinary Term, is automatically forfeit to severely diminished rights in the determination of critical pre-trial motions and proceedings, in denial of all litigants' due process rights to the equal protection of the laws. (See People ex rel. S.L. & T. Co., v. Extraordinary Term, 220 N.Y. 437, opinion by Judge Cardozo; Dreyer v. Illinois, 187 U.S. 71, 84.)

Gravely compounding the dangerous potentials of

this King George-III type enactment, wholly destructive of the independence of the judiciary, the legislature concomitantly whittled away the fundamental rights of an accused to a fair trial. Thus:

Originally, a defendant had the absolute right to present any pre-trial motion to the Special Term of the Supreme Court, rather than to the Extraordinary Term, consistent with his rights of due process and the equal protection of the laws.

Originally, in its pre-amended form as construed by the Cardozo court, the Extraordinary Term when created "became a term of the Supreme Court with the same jurisdiction that belongs to any other term." (Matter of Reynolds v. Cropsey, supra). "It does not enlarge or diminish the rights of litigants****No such interpretation is thinkable." (People ex rel. SL & T Co., 220 NY 487 (1917), per Judge Cardozo.

Subsequently, however, the legislature amended Section 149 of the Judiciary Law, by adding a new subdivision 2 (L. 1953, Ch. 890), substantially diminishing the rights of litigants, reading as follows:

> "2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, or, at the option of the moving party, at a term of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held."

However, by L. 1960, ch. 164, this absolute "option" was replaced by a new subdivision 2, now contained in the present statute, massively diminishing the rights of litigants even further, reading as follows:

> "2. A motion involving a matter pending before such extraordinary special or trial term shall be made returnable at such term, except that, in the exercise of discretion, a justice of the appellate division of the supreme court in the department in which such extraordinary special or trial term is being held may grant permission for such motion to be heard at a term of such appellate division." (emphasis supplied)

Though the intended legislative purpose in amending Section 149 of the Judiciary Law was to provide the Appellate Division with a mean of rejecting motions based on triviality (NY Leg. Ann. 1960, p. 15), however, the screening device of this new Amendment effectively curtailed the intercession of the Appellate Division in most situations heretofore automatically justiciable in that Court under the former statute, to protect a defendant's rights to a fair trial. (See Matter of Klein v. Murtagh, 44 A D 2d 465 (2nd Dept. 1974), affd. N Y 2d (1974); and People v. Steinman, 44 A D 2d 465 (2nd Dept. 1974)

In net effect, a litigant at the bar of criminal justice before the EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT is effectively deprived of the equal protection of the laws accorded all other criminal defendants in

regularly constituted terms of the Supreme Court.

This appellant, as all others similarly situated before the Extraordinary Term, has been deprived of the substantive right to be tried by a judge randomly chosen. Appellant is now compelled to stand trial before the Governor's personally hand-picked judge and hand-picked Special Prosecutor, both of whom are summarily removable at the instance, will, whim or caprice of the Executive.

Further, under the unconstitutional statute aforesaid, a litigant is restricted to the Extraordinary Term alone for vindication of his rights of due process to a fair and impartial trial, save only for the limited right to apply to the Appellate Division with respect to preliminary matters, subject however, to the over-all discretionary right of a justice of the Appellate Division to grant or withhold such permission (Section 149, subd. 2, Judiciary Law).

Illustratively, a defendant before any regular term of the Supreme Court would have the absolute right to move at Special Criminal Term for disqualification of the presiding judge, for a change of venue, or for dismissal of the indictment "required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would

constitute or result in injustice." (Criminal Procedure Law, Sec. 210.40).

In net effect, therefore, appellant has no meaningful accress to the state court, and is irreparably injured thereby.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (Roller v. Holly, 176 U.S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410) Accord: Coe v. Armour, 237 U.S. 413, 424-5; Wuchter, 276 U.S. 13, 24.

Section 63 of the Executive Law, and the Governor's Executive Order No. 58, As Applied, Is Violative of the Due Process Clause.

Section 63 of the Executive Law, implementive of and complementary to Section 149 of the Judiciary Law aforestated, provides in pertinent part as follows:

> "Section 63. General Duties. The Attorney General shall:
>
> "1. Prosecute and defend all actions and proceedings in which the state is interested, and have charge and control of all the legal business of the departments and bureaus of the state, or of any office thereof which requires the services of attorney or counsel, in order to protect the interests of the state * * *.
>
> "2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury

thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement * * *." (Emphasis ours.)

It is our respectful submission that the Court will readily take judicial notice of the fact that the Governor directly requested and/or influenced the appointment of the Special Prosecutor NADJARI, under the Governor's Executive Order No. 58 dated September 19, 1972. (Hunter v. New York Ont. & West R.R. Co., 116 N.Y. 615; 20 Amer. Jur. Evid. Sec. 23; Richardson on Evidence, Sec. 14.52.)

By designating his own Special Prosecutor to manage and conduct all proceedings in the court so controlled by the Executive as aforesaid, the Governor has not only magnified manifold the potential dangers of Section 149 of the Judiciary Law to the independence of the judiciary and to the due process rights of an accused, but has likewise rendered Section 63 of the Executive Law and Executive Order No. 58 issued thereunder, unconstitutional and void, as applied, under the Due Process Clause of the Constitution.

It matters not that the unfettered power thus vested in the Governor springs from the highest ideals and

purest motivations of rooting out a festering corruption in the criminal justice system.

With the utmost deference and respect for the Legislature as the creator of this unconstitutional statute, and for the Governor who convened an Extraordinary Term of the Supreme Court and designated its Presiding Judge pursurant to its terms, and for Judge Murtagh who graces such "Court" under color thereof -- this impressive trilogy of good intentions can never redeem or override the evil potentials of the statute.

In NAACP V. ALABAMA, 377 U.S. 288, at p. 307, the Supreme Court reiterated the guiding principle:

> "...(E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties, when the end can be more narrowly achieved."
> (Cases cited)

It is no mere coincidence that of the total of some 110 persons charged in 76 indictments thus far (New York Times, Sept. 15, 1974) returned by the Special Grand Juries

operating under color of these statutes and the Governor's Executive Order issued thereunder, a proliferating number of those charged have interposed defenses of wholesale entrapment, failure to arraign defendants in a criminal court, scandalous prosecutorial misconduct violative of due process, gross abuse of jurisdiction, etc., etc. (See People v. Harding, ___AD 2d___ (1st Dept.); People v.Mackell, Queens County; People v. Rosenberg, Kings Co.; People v. Poyer; People v. Guidice, Kings Co.; People v Paul P.Rao,Sr.; People v. Paul P. Rao, Jr., App Div 2d Dept; People v. Archer, Queens Co.; People v Rinaldi, Kings Co.)among others.

The settled law is that federal intervention via declaratory and injunctive relief is properly maintainable against enforcement of a state statute in general, if it is unconstitutionally applied. (Steffel v. Thompson, ___US ___ decided March 19, 1974 14 CrL 3123); Younger v. Harris, 401 US 37; Samuels v. Mackell, 401 US 66; Sands v Wainwright, 491 F 2d 417 (CA 5, 1973).

In Illinois Central R.R. Co. v Miss. Public Service Co., 133 F Supp. 304 (3-Judge Court) the Court stated:

> "In case of serious doubt as to the adequacy of the remedy at law, the federal courts resolve this doubt in favor of their jurisdiction in equity; * * *"

In Donovan v. Pennsylvania, 199 US 279, the Supreme Court, citing Chicago General R. Co. v. Chicago B & Q R. Co., 15; Ill. 605, 611, reiterated the applicable rule:

> "When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." (cases cited).

POINT III.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S APPLICATION FOR A THREE-JUDGE COURT AND IN DISMISSING THE ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF.

With all due deference to the District Court below, we respectfully submit that the Court erred in denying appellant's application for a three-judge Court, and in dismissing the complaint for a Declaratory Judgment and injunctive relief.

The District Court did not dispute that the prosecutorial misconduct alleged at bar was violative of due process. Indeed, inferentially, it appears from the Court's decision, it agreed with appellant's view that it was conduct shocking to the conscience and offensive to the rules of law. In the Court's opinion, it stated as caveat: "This Court reiterates its comment in its August 8, 1974 memorandum that investigatory methods should never undermine the integrity of the judicial process." See also Rochin v. California, 342 US 165 (1952) and United States v. Russell, 411 US 423, 431 (1973) (App. p. 104).

Further, the District Court did not expressly consider the crucial impact of the facial unconstitutionality of the statutes in issue, under and by which appellant's right to seek redress under the special circumstances at bar have been irreparably injured by relegating him to the unconstitutional Extraordinary Term, as aforestated.

Further, the District Court erred in holding as follows:

"When what in substance being challenged is neither a statute, nor the policy underlying the statute,

but rather the activities of a state officer appointed under the authority of the statute, resort to a three-judge court is inappropriate. Phillips v. United States, 312 US 246 (1941); Ex Parte Bransford, 310 US 354 (1940); Galvan v. Levine, 490 F 2d 1255, 1258 (2d Cir. 1973) (Appendix, P.91)

The fact is, however, that appellant's basic challenge to the state statutes and the Governor's Executive Order No. 58, facially and as applied, was specifically directed to the patent unconstitutionality of NADJARI's actions which, as a matter of policy, involved the systematic employment of such prosecutorial techniques shocking to the conscience and violative of fundamental tenets of decency under the rule of law, as (a) the arrest of defendants, without arraignment in a court of law; (b) the denial of the right of counsel during a critical stage of the proceedings against them; (c) the deployment of undercover "defendants" camouflaged as "arrested" or "convicted" individuals, involving the wholesale practice of perjury, subornation of perjury before grand juries and the courts, without any authorization in law, and finally (d) the wholesale entrapment of individuals through agent provocateurs, in wilful defiance of this very Court's pointed admonition in Archer to desist therefrom.

The sinister tactic of arrest-without-arraignment for the purpose of ensnaring and entrapping others has been a standard policy of appellee NADJARI in several reported cases, as applied and practiced by him under Executive Order No. 58, several of which have already surfaced in the public notoriety. Among those

involved a former Law Secretary to a Justice of the Supreme Court in the County of Kings, one Frank Guidice, who was likewise arrested without ever having been arraigned in a court of law, and surreptitiously "wired" to entrap judges and others within the criminal justice system.

Still another case involved Judge Newton M. Poyer, an elected judge of the Civil Court, New York County, who though actually arrested, was likewise never formally arraigned in a court of law, but immediately pressed into service as a wired informant for NADJARI.

Of course, this Court has power to judicially notice the latter proceedings in other courts. Coleman v. Burnett, 477 F 2d 1187, 1198); Creamer v. Washington, 168 US 124; Butler v. Eaton, 141 US 240, 243-4).

In the Poyer case, the appellee publicly acknowledged as follows:

> "This may be the first time in the history of New York Law enforcement that a judicial officer acted in an undercover capacity." (New York Times, Nov. 5, 1974)

Aptly enough in an editorial of the New York Times, Nov. 8, 1974, entitled "Tarnished Justice" it stated:

> "By turning a Civil Court judge who was about to be tried for conspiracy into an undercover agent, and then letting him off the hook by a form of judicial plea bargaining, Special State Prosecutor Maurice H. Nadjari has engaged in highly questionable practices. No matter what leads may be developed for future indictments, spies in the courthouse equipped with recording devices give the criminal justice system a criminal air"

Indeed, in a very recent speech delivered by appellee to

the New York County Lawyers Association on January 22, 1975, appellee's fixed policy was overtly reported as follows: (NYLJ, Jan. 23, 1975, p. 1)

> "Special State Prosecutor Maurice H. Nadjari yesterday strongly defended his use of undercover agents in investigating judicial corruption. He said it was the only practical method.
>
> Recalling the scathing attack on his method by the Appellate Division, Second Department, six weeks ago, he said that judges "don't take a fix in Macy's window" and that his method was the only way "to get to the bottom of judicial corruption."

We respectfully submit that the cases relied on by the District Court below are markedly distinguishable from the fixed policy of the appellee at bar.

In Phillips v. United States, 312 US 46, the Court noted that, in order to invoke a three-judge court restraining the enforcement of a state statute, "the complainant must seek to forestall the demands of some general state policy, the validity of which he challenges ***. What is here challenged is a single, unique exercise of these prerogatives of (the Governor's) office." (underscoring ours)

In Ex parte Bransford, 310 US 354, a three-judge court was denied because "the attack is aimed at an allegedly erroneous administrative action", rather than the constitutionality of the statute.

In Galvan v. Levine, 490 F 2d 1245 (CA 2,1973) rejecting a contention of alleged discriminatory application of a statute, on the authority of Phillips v. United States, supra, and Ex

ex parte Bransford, 310 US 354, this Court nevertheless took occasion to state:

> "While "(t)he distinction is treacherously subtle, and difficult to rationalize", perhaps indeed impossible to apply in any principled way, courts must do the best they can with it in what we devoutly hope to be the short period during which the Congress permits Sec. 2281 to continue to plague all three levels of the federal

Here, by contrast, the general policy of appellee embraced unremitting entrapment of individuals on a sustained scale; repeated arrests without arraignments of individuals, violative of the due process rights enunciated in Coleman v. Alabama, supra; the systematic spoliation of state statutes by deception of grand juries and the courts with false affidavits, false swearing and suborned perjury through make-believe undercover "defendants"; (People v. Rao, supra; United States v. Archer, supra); and finally, among other fixtures of gross prosecutorial misconduct, the wilful deception of the courts, both of this Court in Archer and the Appellate Division of the Supreme Court, that NADJARI had had the sanction and approval of the Chief Judge of the State for the employment of manufactured "defendants" as a ploy of law enforcement.

Directly pertinent is Helfant v. Kugler, 484 F 2d 127, en banc, (CA 3, 1973) cert. granted Nov. 18, 1974 (16 CrL 4064), wherein the Court enjoined a pending state criminal prosecution under parallel "extraordinary circumstances" evincing a denial of meaningful access to the state courts. Said theCourt:

"Neither the Supreme Court nor this court has considered what extraordinary circumstances will justify federal intervention in a pending state prosecution. But the Younger v. Harris line of cases is predicated upon the fundamental assumption that defense of the pending state prosecution affords an adequate remedy at law for the vindication of the federal constitutional right at issue. Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law."

Though the District Court below took due cognizance of Helfant, it elected nevertheless to disregard its applicability herein (101-103).

POINT IV

APPELLANT WAS INDEPENDENTLY ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF TO REDRESS THE DEPRIVATION OF HIS CONSTITUTIONAL RIGHTS, UNDER 28 USC 1343.

Title 28 United States Code Section 1343, subd. 3 provides:

"Sec. 1343. Civil rights and elective franchise.
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress for equal rights of citizens or of all persons within the jurisdiction of the United States;"

As is explicitly manifest, the Congress has granted a broad right to "redress" the deprivation of constitutional rights (subd.3) in addition and wholly apart from the general right to recover damages therefor (Subds. 1, 2, 4).

Clearly, then, the right to "redress" necessarily embraces the full panoply of declaratory and injunctive relief prayed for herein, to vindicate the deprivation of the appellant's constitutional rights.

The intent of 28 USC Section 1343 is to enforce the Fourteenth Amendment of the Constitution (Katzenbach v. Morgan, 384 US 641; Holt v. Indiana Mfg. Co., 176 US 68; Eisen v. Eastman, 421 F 2d 560 (CA 2, 1969) cert den. 400 US 841; Hackin v. Lockwood, 361 F 2d 499 (CA Ariz. 1966), cert. den. 385 US 960); Hatfield v. Bailleaux, 290 F 2d 632 (CA Or. 1961); Davis v. Foreman, 251 F 2d 421, cert. den. 356 US 974; Horn v. Peck, 130 F Supp. 536; Refoule v. Ellis, 74 F. Supp. 336).

This Court has definitively held that "The requirement of due process***extends to the pre-trial conduct of law enforcement authorities". (United States v. Toscanino, 500 F 2d 267, 274 (CA 2, 1974) Citing Russell, Archer and Rochin, supra.

The dismissal of an indictment is a severe remedy, to be sure. But, as the United States Supreme Court recently declared in an unanimous opinion delivered by Chief Justice Ruger: "...such severe remedies are not unique in the application of constitutional standards". (Strunk v. United States, 93 S. Ct. 2260 (1973).

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CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED UNDER THE DUE PROCESS CLAUSE OF THE 5th AND 14th AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES FOR THE CONCLUSIVELY DOCUMENTED PROSECUTORIAL MISCONDUCT OF THE APPELLEE NADJARI.

Respectfully submitted,

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STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of Feb. 1976 deponent served the within Brief upon Maurice Madigna

attorney(s) for Appellee

in this action, at 2 World Trade Center NYC 10047

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
10 day of Feb. 1976

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976